

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
DeltaCom, Inc.	)	File Nos. 0003859347
Applications for Renewal and	)	0003859348
Requests for Waiver of the Filing Deadline for	)	0003859349
Stations WPOI503, WPOI504, and WPOI505	)	

**Order**

**Adopted: April 12, 2012**

**Released: April 12, 2012**

By the Assistant Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On June 4, 2009, DeltaCom, Inc. (DeltaCom) filed applications to renew its licenses for Stations WPOI503, WPOI504, and WPOI505, along with requests to waive the deadline for filing the applications.<sup>1</sup> The scheduled expiration date for the licenses and the deadline for filing the associated applications for renewal was March 22, 2009. On June 19, 2009, DeltaCom also filed requests for special temporary authority (STA) to allow it to continue operating the stations while its late-filed renewal applications and waiver requests remained pending.<sup>2</sup> For the reasons discussed below, we deny the waiver requests, dismiss the late-filed renewal applications, and grant the STA requests to allow DeltaCom to discontinue operations in an orderly manner.

**II. BACKGROUND**

2. The three Stations WPOI503, WPOI504, and WPOI505 were authorized, respectively, to operate on channel blocks B, C, and D of the 220-222 MHz (QA) band in the Detroit-Ann Arbor-Flint, Michigan market area (BEA 057). In 1998, DeltaCom was the highest bidder in Auction No. 18, the 220 MHz auction, on six licenses, including the authorizations for Stations WPOI503, WPOI504, and WPOI505.<sup>3</sup> The licenses were granted on March 22, 1999, with ten-year terms ending March 22, 2009.

3. Section 90.767(a) of the Commission's rules requires a Phase II 220 MHz Service Economic Area (EA) licensee to provide coverage to at least one-third of the population of the EA within

<sup>1</sup> FCC File Nos. 0003859347, 0003859348, 0003859349, filed by DeltaCom, Inc., Atts. "Letter from Alan S. Tilles, Esq., Counsel for DeltaCom, Inc. to Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau" (June 4, 2009) (Waiver Requests).

<sup>2</sup> FCC File Nos. 0003886738 (for WPOI503), 0003886785 (for WPOI504), and 0003886791 (for WPOI505), filed by DeltaCom, Inc. (June 19, 2009).

<sup>3</sup> FCC File No. 0000002477, filed by DeltaCom, Inc. (Nov. 5, 1998). Phase I 220 MHz Service licensing was conducted by lotteries that awarded approximately 3,800 licenses through random selection for site-specific or nationwide operations. Auction No. 18 awarded Phase II 220 MHz Service licenses through competitive bidding for varying sized geographic areas, e.g., Economic Areas, regional, and nationwide operations. DeltaCom also won Phase II 220 MHz Service licenses in Auction No. 18 for Stations WPOI506, WPOI507, and WPOI508. *Id.* Each of these licenses, however, has automatically terminated for failure to meet the Commission's coverage requirements.

five years of the issuance of its initial license.<sup>4</sup> The five-year coverage requirement deadline for Stations WPOI503, WPOI504, and WPOI505 was, therefore, March 22, 2004. Section 1.946(e) of the Commission's rules also allows licensees to request an extension of a coverage period.<sup>5</sup> On February 10, 2004, DeltaCom submitted a request to extend the deadline of its five-year coverage period for Station WPOI505.<sup>6</sup> Around that same time, several other Phase II 220 MHz Service licensees sought waiver or extension of the coverage requirements for their licenses. In response, the Wireless Telecommunications Bureau adopted an order on July 13, 2004, extending the five-year construction deadline for many Phase II 220 MHz EA, regional, and nationwide licenses until November 5, 2007.<sup>7</sup> In accordance with that order, DeltaCom's request was granted on July 15, 2004, and the five-year coverage deadline for Station WPOI505 was extended to November 5, 2007. The five-year coverage deadline for Stations WPOI503 and WPOI505, however, remained March 22, 2004.

4. A Phase II 220 MHz EA licensee must also notify the Commission that it has met a coverage requirement within 15 days of the expiration of the applicable coverage period by filing the notification through the Commission's Universal Licensing System (ULS) on FCC Form 601.<sup>8</sup> The deadline for notifying the Commission that DeltaCom had met its five-year coverage requirement for Stations WPOI503 and WPOI504 was April 6, 2004, but the licensee did not submit notifications by that date. As a result, the Mobility Division (Division) issued a letter dated October 12, 2004, notifying the licensee that because Commission records indicated DeltaCom had not submitted notifications that it had met the five-year coverage requirements or filed requests for extension of time to complete construction, the licenses for Stations WPOI503 and WPOI504 automatically terminated as of March 22, 2004.<sup>9</sup>

5. After the licenses automatically terminated, on November 10, 2004, DeltaCom filed a petition seeking reconsideration of the termination of the licenses or, alternatively, requests for waiver to permit it to submit late-filed notifications.<sup>10</sup> On November 24, 2004, DeltaCom also filed notifications stating it had met the coverage requirements for Stations WPOI503 and WPOI504, along with requests to

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<sup>4</sup> 47 C.F.R. § 90.767(a).

<sup>5</sup> *Id.* § 1.946(e)

<sup>6</sup> FCC File No. 0001612580, filed by DeltaCom, Inc. (Feb. 10, 2004). DeltaCom's extension request also included three other stations that it had obtained through Auction No. 18, WPOI506, WPOI507, and WPOI508, but not Stations WPOI503 or WPOI504. *Id.*

<sup>7</sup> In the Matter of Warren C. Havens for Waiver or Extension of the Five-Year Construction Requirement for 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13002, ¶ 19 (WTB 2004). In relevant part, the Bureau extended the five-year construction deadline for a three-year period until November 5, 2007, for "all 220 MHz Phase II EA, regional, and nationwide licenses that timely sought an extension of the applicable construction deadline, if the construction deadline has expired as of the date of the release of this order." *Id.*

<sup>8</sup> 47 C.F.R. § 90.767(b) (citing § 1.946(d)) (providing that "[l]icensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the construction requirements of paragraph (a) of this section"). Section 1.946(d) provides that "[a] licensee who commences service or operations within the construction period or meets its coverage or substantial services obligations within the coverage period must notify the Commission by filing FCC Form 601. The notification must be filed within 15 days of the expiration of the applicable construction or coverage period." *Id.* at § 1.946(d).

<sup>9</sup> Letter from Thomas Derenge, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Mr. John Zimmerman, DeltaCom, Inc. (Oct. 12, 2004); see *Public Notice*, Report No. 1967 at 1 (Oct. 20, 2004) (listing Stations WPOI503 and WPOI504 as terminated as of October 13, 2004).

<sup>10</sup> Letter from Michael Ferrante, Associate Chief, Mobility Division to Alan S. Tilles, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, Counsel for DeltaCom, Inc. at 1 (Dec. 23, 2004) (*2004 Reinstatement Letter*). DeltaCom argued in its petition that it believed its comments provided in the Warren C. Havens 220 MHz extension request proceeding served as sufficient notice of construction for its licenses. *Id.* at 2.

waive the deadline for filing the notifications.<sup>11</sup> The Division denied DeltaCom's petition and waiver requests, which failed to meet the Commission's waiver standards, but on its own motion accepted the late-filed coverage notifications and reinstated the licenses for Stations WPOI503 and WPOI504.<sup>12</sup> On November 9, 2007, DeltaCom did file in a timely manner a notification that it had met the five-year coverage requirement for Station WPOI505.<sup>13</sup> That notification was accepted on January 8, 2008.

6. Section 90.767(a) of the Commission's rules also requires a Phase II 220 MHz Service EA licensee to provide coverage to at least two-thirds of the population of the EA within ten years of the issuance of its initial license.<sup>14</sup> The ten-year coverage requirement deadline for Stations WPOI503, WPOI504, and WPOI505 was, therefore, March 22, 2009, also the expiration date of the licenses. ULS issued letters to DeltaCom for each station on December 23, 2008, to remind the licensee that it must file coverage requirement notifications no later than 15 days after March 22, 2009.<sup>15</sup> ULS also issued letters for each station on December 29, 2008, to remind DeltaCom that the authorizations for Stations WPOI503, WPOI504, and WPOI505 would soon expire and needed renewed.<sup>16</sup>

7. In response, DeltaCom filed notifications for all three stations on April 6, 2009, in a timely manner, arguing that each station had met its ten-year coverage requirement by providing substantial service within its authorized geographic area.<sup>17</sup> DeltaCom, however, did not file applications to renew the station licenses. As a result, the licenses for Stations WPOI503, WPOI504, and WPOI505 automatically terminated as of their expiration date, March 22, 2009. Because the licenses expired, DeltaCom's ten-year coverage notifications were dismissed by letters dated May 12, 2009.<sup>18</sup> On June 4, 2009, three weeks after the dismissal letters were issued, DeltaCom filed its applications to renew the licenses for Stations WPOI503, WPOI504, and WPOI505, along with requests to waive the deadline for filing the applications. The renewal applications were placed on public notice as accepted for filing on June 10, 2009.<sup>19</sup> No oppositions were filed against the applications or the waiver requests. Two weeks after filing its renewal applications, on June 19, 2009, DeltaCom submitted its STA requests seeking authority to allow it to continue operating the three stations.

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<sup>11</sup> FCC File Nos. 0001949502 (WPOI503) and 0001949541 (WPOI504), filed by DeltaCom, Inc. (Nov. 24, 2004). The requests sought waiver of the filing deadline "to permit DeltaCom to file, past fifteen (15) days of the expiration of the applicable build-out date a required notification for its call sign WPOI503 [and WPOI504]." *Id.* These requests, however, offered no rationale for the late filings.

<sup>12</sup> *2004 Reinstatement Letter* at 2-3.

<sup>13</sup> FCC File No. 0003227448, filed by DeltaCom, Inc. (Nov. 9, 2007).

<sup>14</sup> 47 C.F.R. § 90.767(a).

<sup>15</sup> ULS Reference Nos. 4815441 (WPOI503), 4815440 (WPOI504), and 4815440 (WPOI505) (Dec. 23, 2008).

<sup>16</sup> ULS Reference Nos. 4816174 (WPOI503), 4816175 (WPOI504), and 4816176 (WPOI505) (Dec. 29, 2008).

<sup>17</sup> FCC File No. 0003797878 (WPOI503), filed by DeltaCom, Inc. (Apr. 6, 2009) (stating that while Station WPOI503 is "not providing service to 66%, or 2/3 of the total population" of the market area, it does "provide service to ... approximately 61.2% of the total population" of the market area); FCC File No. 0003797892 (WPOI504), filed by DeltaCom, Inc. (Apr. 6, 2009) (same showing as Station WPOI503); and FCC File No. 0003797894 (WPOI505), filed by DeltaCom, Inc. (Apr. 6, 2009) (stating that while Station WPOI505 is "not providing service to 66%, or 2/3 of the total population" of the market area, it does "provide service to ... approximately 62% of the total population" of the market area).

<sup>18</sup> ULS Reference Nos. 4863442 (WPOI503), 4863443 (WPOI504), and 4863444 (WPOI505), "Notice of Dismissal" (May 12, 2009) (explaining that "[t]he license for which this application has been filed has recently expired ... because the license is no longer valid, this application cannot be acted upon").

<sup>19</sup> *Public Notice*, Report No. 5007 at 3 (June 10, 2009).

### III. DISCUSSION

8. Commission rules require 220 MHz Service EA licensees to file renewal applications no sooner than 90 days prior to expiration and no later than the expiration date of the license for which renewal is sought.<sup>20</sup> A licensee of a 220 MHz Service EA station must also demonstrate in its renewal application, separate from the population coverage information submitted in a coverage notification, that it has provided “substantial service” during the past license term and that it has substantially complied with applicable Commission rules, policies, and the Communications Act of 1934, as amended.<sup>21</sup> In fact, licenses automatically terminate upon the expiration date, unless a timely application for renewal that fully complies with Commission requirements is filed.<sup>22</sup>

9. Licensees may, however, file an application for renewal and request a waiver of the filing deadline if the renewal application is not filed in a timely manner. We may grant a waiver request, pursuant to Section 1.925 of the Commission’s rules, if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>23</sup>

10. Under its policy regarding late-filed renewal applications in wireless services, the Commission has acknowledged that there may be circumstances when a renewal filing is missed and that the subsequent denial of the renewal application and termination of the license would be too harsh a result in proportion to the nature of the violation.<sup>24</sup> To mitigate a harsh result, under the Commission’s policy regarding late-filed renewal applications in wireless services, where a renewal application is filed up to 30 days after the license expiration date, a waiver of the filing deadline and the renewal application will be granted as long as the application is otherwise sufficient under Commission rules, but the licensee may be subject to enforcement action.

11. In cases where the renewal application is filed more than 30 days after the license expiration date, however, the waiver request will not be routinely granted, is subject to stricter review, and also may be accompanied by enforcement action.<sup>25</sup> In determining whether to grant a waiver request, the Commission takes into consideration all of the facts and circumstances involved, including the length in delay of filing, the licensee’s performance record, the reasons for the failure to timely file, and the potential consequences to the public if the license were to terminate.<sup>26</sup> Because DeltaCom filed its

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<sup>20</sup> See 47 C.F.R. § 90.743(a) (providing that “[a]ll licensees seeking renewal of their authorizations at the end of their license term must file a renewal application in accordance with the provisions of § 1.949 of this chapter”).

<sup>21</sup> *Id.* § 90.743(a)(1)-(2). Section 90.743(a)(1) defines “substantial service” for purposes of renewal as “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.” *Id.* § 90.743(a)(1).

<sup>22</sup> *Id.* § 1.955(a)(1).

<sup>23</sup> *Id.* § 1.925(b)(3)(i)-(ii).

<sup>24</sup> In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476, 11485, ¶ 22 (1999) (*ULS MO&O*).

<sup>25</sup> See, e.g., Shubat Transportation Company, *Notice of Apparent Liability for Forfeiture*, 26 FCC Rcd 3782 (EB 2011) (proposing a forfeiture of \$19,000 for unauthorized operation and failure to submit a renewal application in a timely manner for a private land mobile radio service station).

<sup>26</sup> *ULS MO&O*, 14 FCC Rcd at 11485-86, ¶ 22.



renewal applications over two and one-half months after the licenses expired, its requests for waiver are subject to this stricter level of review.

12. We find that DeltaCom has failed to make the requisite showing that grant of its waiver requests is warranted under the circumstances presented. In each waiver request, DeltaCom explains that “DeltaCom and the Licensing Specialist completing the buildout notification filings overlooked the March 22, 2009 expiration date” and that “the failure to timely-file the required renewal applications was simply an administrative oversight.”<sup>27</sup> The Commission has previously determined that inadvertent failure to renew a license in a timely manner is clearly not so unique or unusual in itself as to warrant a waiver of the Commission’s rules.<sup>28</sup> In particular, the Commission has expressly rejected certain reasons, in and of themselves, for a licensee’s inadvertent failure to file a renewal application in a timely manner, including “simple forgetfulness” and “administrative oversight,”<sup>29</sup> and has emphasized that a licensee is fully responsible for knowing the terms of its license and filing a timely renewal application.<sup>30</sup>

13. In certain cases, however, we have granted waiver of the deadline for filing renewal applications where the licensee has demonstrated it attempted in good faith to comply with Commission requirements. For example, we have repeatedly held that the filing of a timely, but defective renewal application warrants a waiver to permit the late filing of a subsequent renewal application, where the licensee acted in good faith and moved promptly to file a proper renewal application after learning that

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<sup>27</sup> Waiver Requests at 1-2.

<sup>28</sup> *Anderson Communications*, Memorandum Opinion and Order, 16 FCC Rcd 15020, 15021, ¶ 5 (2001) (*Anderson Communications*); *Peacock’s Radio and Wild’s Computer Service, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15016, 15017, ¶ 5 (2001) (*Peacock’s Radio*) (citing *Fresno City and County Housing Authorities*, Order on Reconsideration, 15 FCC Rcd 10998, ¶ 11 (2000) (*Fresno City and County*) (citing *Plumas-Sierra Rural Electric Cooperative*, Order, 15 FCC Rcd 5572, 5575, ¶ 9 (PSPWD WTB 2000)); Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Elizabeth R. Sachs, Esq., Counsel for G & D Communications, Inc. at 3 (ULS Call Sign WNYV719) (June 30, 2011); Ramona P. Patts, City of Columbus, Ohio, Letter, 25 FCC Rcd 16326, 16327 (BD WTB 2010) (*City of Columbus Decision*) (citing Ms. Elaine Piccolo, AlarmNet, Inc., Letter, 24 FCC Rcd 11766, 11767-68 (BD WTB 2009) (*AlarmNet Decision*)); Ms. Janet Tucker, ConocoPhillips Communications Inc., Letter, 24 FCC Rcd 11755, 11756 (BD WTB 2009) (*ConocoPhillips Decision*)).

<sup>29</sup> *ULS MO&O*, 14 FCC Rcd at 11485 ¶ 21. In particular, the Commission rejected the view that turnover in recordkeeping personnel, failure to check computer records, or simple forgetfulness are valid excuses, in and of themselves, for failure to file a timely renewal application. *Id.*; see *City of Columbus Decision*, 25 FCC Rcd at 16327 (denying a request for waiver of the deadline for filing renewal applications where the licensee did not file its applications in a timely manner because of administrative oversight); Alan S. Tilles, Esq. Bangor Hydro Electric Company, Letter, 25 FCC Rcd 13312, 13314 (BD WTB 2010) (*Bangor Hydro Decision*) (same); *AlarmNet Decision*, 24 FCC Rcd at 11767 (same); *ConocoPhillips Decision*, 24 FCC Rcd at 11757 (same); Billy Williford d/b/a Jasper Mobil Phone, 17 FCC Rcd 477, 479 ¶ 5 (CWD WTB 2002) (affirming the underlying Branch ruling that inadvertent oversight is an insufficient basis for granting waiver of the deadline for filing renewal applications); Malden R-1 School District, Order, 17 FCC Rcd 23654 (PSPWD WTB 2002) (denying a request for waiver of the deadline for filing renewal applications where the licensee did not file its applications in a timely manner because of his own administrative oversight; he misfiled the Commission’s renewal notices and only filed the applications after the notices came to the appropriate person’s attention nearly two months after the licenses expired).

<sup>30</sup> *ULS MO&O*, 14 FCC Rcd at 11485 ¶ 21; In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Report and Order, 13 FCC Rcd 21027, 21071, ¶ 96 (1998); see also James A. Kay, Jr., Memorandum Opinion and Order, 18 FCC Rcd 7585, 7587-88, ¶ 8 (2003) (stating that it is well-established that licensees are responsible for submitting renewal applications in a timely manner); *Anderson Communications*, 16 FCC Rcd at 15021, ¶ 5 (emphasizing that each licensee is solely responsible for knowing the terms of its license and submitting a renewal application in a timely manner); *Peacock’s Radio*, 16 FCC Rcd at 15017, ¶ 5 (same).

the original attempt fell short.<sup>31</sup> We have also granted waiver of the deadline for filing renewal applications where the licensee provided documentation showing that it had attempted in good faith, but failed, to file a renewal application in a timely manner,<sup>32</sup> or dismissal of the renewal application stemmed from a technical problem in ULS beyond the licensee's control.<sup>33</sup>

14. We have also granted waiver of the deadline for filing renewal applications where the licensee demonstrated that the late-filed application was intended to be part of a larger group of

<sup>31</sup> See Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Mr. Philip Adler, Tuchman & Brown Investments Inc. No. 2 (ULS Call Sign WPQP245) (Dec. 14, 2011) (*Tuchman & Brown*) (granting a request for waiver of the deadline for filing renewal applications where the licensee's initial renewal application for its 220 MHz license was filed in a timely manner, but was dismissed because it did not include information showing it met substantial service and other compliance requirements during the term of the license); Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Pilot Communications (ULS Call Signs KNKI208 *et al.*) (July 11, 2011) (granting a request for waiver where but for an erroneous finding that the licensee had failed to pay regulatory fees for two FM radio permits, the timely filed renewal applications for nine paging licenses would not have been dismissed); Paging Systems, Inc., *Order*, 26 FCC Rcd 5913 (MD WTB 2011), *aff'd on reconsideration*, 26 FCC Rcd 16175, 16177, ¶ 6 (MD WTB 2011) (granting a request for waiver where the licensee's timely filed renewal application was dismissed because the licensee mistakenly submitted the application as a modification application, rather than as a renewal-modification application, as intended); City of Dardanelle Fire Department, *Order*, 17 FCC Rcd 10901 (PSPWD WTB 2002) (granting a request for waiver where the licensee's application was untimely only because the first three attempts to renew its license in a timely manner were defective, reflecting a good-faith effort on the part of the licensee to retain its license); Kent H. Sager, *Order*, 16 FCC Rcd 21353 (CWD WTB 2001) (noting that the licensee's diligent efforts to file a timely renewal application four days prior to the license expiration date and promptly resubmitting its application to correct any noted errors did not warrant a result as severe as license termination); KNTV License, Inc., *Order*, 16 FCC Rcd 20440 (PSPWD WTB 2001) (granting the request for waiver, in significant part, where the licensee filed its first set of applications to renew its two licenses nearly two weeks prior to their scheduled expiration dates, "clearly demonstrat[ing] its intent to remain authorized to operate the subject stations in compliance with the Commission's Rules"); Navopache Electric Cooperative, Inc., *Order*, 16 FCC Rcd 11870 (PSPWD WTB 2001) (finding that it was clear from the timely filing of a renewal application, albeit defective, that the licensee intended to renew the license); City of Henderson, Nevada, *Order*, DA 99-2005 at ¶ 7 (PSPWD WTB 1999) (finding it particularly relevant that the licensee did not simply allow its license to lapse, but attempted in good faith to renew its license in a timely fashion reflecting good faith efforts to retain the license); see also James H. Barker, Esq., Cricket Licensee (Reauction), Inc., *Letter*, 24 FCC Rcd 3298, 3305-06 (MD WTB 2009) (*Cricket Reauction*) (finding a distinction exists between a licensee that unsuccessfully attempts to file a renewal application in a timely manner, and a licensee that takes no action until after the filing deadline, in which case the licensee has almost always simply forgotten about or overlooked the deadline); State Contracting and Engineering Corporation, *Order on Reconsideration*, 18 FCC Rcd 1685, 1689, ¶ 11 (PSPWD WTB 2003) (finding a clear distinction between a licensee that unsuccessfully attempts to renew the license before it expires, and one that submits nothing until more than 30 days after the license expiration date).

<sup>32</sup> See *Cricket Reauction*, 24 FCC Rcd at 3302-03 (granting a request for waiver of the deadline for filing a renewal application, in part, where the licensee provided a copy of a "draft" renewal application that was generated in ULS within the 90-day renewal period, but not filed, demonstrating that the licensee intended to retain its license and attempted in good-faith to comply with Commission rules).

<sup>33</sup> Compare San Bernard Electric Cooperative, Inc., *Order on Reconsideration*, 17 FCC Rcd 16111 (PSPWD WTB 2002) (granting a request for waiver of the deadline for filing renewal applications after finding that a payment defect relating to the licensee's initial renewal application was a consequence of a technical problem in ULS beyond the licensee's control resulting in a screen indicating the applicant had paid a filing fee, even though the payment had not been received; and finding that a printout of the ULS screen indicating that the fee associated with the licensee's application had been paid corroborated the licensee's contention that it believed it had paid the fee), with Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Mr. Ottis L. Anderson (ULS File Nos. 0003827481, 0003827483, and 0003827484) (Aug. 11, 2011) (rejecting an argument that the licensee had attempted in good faith to file renewal applications based on an unsubstantiated assertion that ULS would not allow the licensee to file renewal applications after the licenses expired).

applications that were filed in a timely manner. In *Nex-Tech, Inc.*, for example, counsel for Nex-Tech, Inc. (NTI) and NTI's subsidiary, Nex-Tech Wireless, LLC (Nex-Tech Wireless), believed he had filed certain construction notifications and renewal applications needed for the companies' broadband PCS authorizations in a timely manner, but actually submitted applications and notifications for only two of four licenses.<sup>34</sup> NTI obtained the two licenses at issue through competitive bidding and Nex-Tech Wireless obtained its two licenses by disaggregating spectrum from NTI's licenses.<sup>35</sup> As a result, each licensee, NTI and Nex-Tech Wireless, held licenses with the same expiration dates, covering the exact same geographic areas.

15. NTI's broadband PCS licenses were issued to operate on 30 MHz of spectrum, and licensees of 30 MHz blocks must meet coverage requirements and file construction notifications both at five-year and ten-year benchmarks.<sup>36</sup> Because the license term for broadband PCS licenses is ten years, the deadline for meeting final coverage requirements also falls on the license expiration date. While all four licenses had the same expiration date, and therefore the same filing deadlines for the ten-year construction notifications and renewal applications, counsel only submitted construction notifications and renewal applications for Nex-Tech Wireless's two licenses in a timely manner.

16. To support its argument that it had attempted in good faith to file all four applications in a timely manner, NTI described the steps taken within the 90-day renewal period to prepare and submit the required filings for all of the licenses. The licensee also submitted a declaration signed by counsel responsible for making filings, stating, under the penalty of perjury, that after approving the construction showings for the covered areas, he mistakenly believed that all of the filings had been completed, and unintentionally did not file construction notifications or renewal applications for NTI's licenses.<sup>37</sup> The fact that construction notifications were prepared for the relevant market areas, in conjunction with the actual filing of the notifications and renewal applications for Nex-Tech Wireless's licenses, supported NTI's claim that it fully intended to file construction notifications and renewal applications for its licenses before the filing deadlines.<sup>38</sup> Moreover, immediately upon receiving information that the licenses had not been renewed, NTI filed its renewal applications along with requests for waiver of the filing deadline. The

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<sup>34</sup> Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Tony S. Lee, Esq., Counsel to Nex-Tech, Inc. (Sept. 9, 2010) (ULS File Nos. 0003957435 and 00003957438) (*NTI Decision Letter*).

<sup>35</sup> The licenses authorize operations in the Great Bend, Kansas market area, and in the Hays, Kansas market area. *Id.* at 1. Nex-Tech Wireless also held a PCS license for the Salinas, Kansas market area that expired on the same day as its other two PCS licenses at issue in the proceeding. A construction notification and renewal application were also filed in a timely manner for the Salina, Kansas license. *Id.* at 3.

<sup>36</sup> 47 C.F.R. § 24.203(a). Under the terms of its disaggregation agreement, NTI and Nex-Tech Wireless elected to share the construction obligations for the two market areas. *NTI Decision Letter* at 5.

<sup>37</sup> *NTI Decision Letter* at 8-9. Counsel explained that he met with company personnel several months prior to the filing deadlines to discuss filing requirements and that "the renewal and construction filings were envisioned to be prepared and filed simultaneously as part of a 'package' filing as renewal of the licenses was conditioned on satisfaction of the 10-year construction benchmark." *Id.* at 8. The plan, according to counsel, was to prepare the ten-year construction showing in-house, forward them to him for review, and subsequently file the showings at the same time as the renewal applications. *Id.* In fact, nearly one month prior to the filing deadline, NTI forwarded construction showings to counsel, who approved them for filing. *Id.* Counsel further explained that he did not realize that the construction showings and renewal filings for the two market areas were only made for Nex-Tech Wireless's licenses, and that, in fact, he believed the construction and renewal filings had been made for all four licenses "because the counties covered were the same, the maps were the same, the signal coverage was the same, and the covered populations were the same." *Id.* at 8-9.

<sup>38</sup> *Id.* at 9-10.

Division granted NTI's requests for waiver finding that the licensee demonstrated that it intended in good faith to file the notifications along with renewal applications for all of the licenses in a timely manner.<sup>39</sup>

17. In the instant case, DeltaCom states in its waiver requests that "[t]he timely-filing of the required buildout notifications ... clearly shows that [it] ... fully intended to and, in good faith, did comply with the Commission's buildout requirements."<sup>40</sup> DeltaCom, however, has not provided any information to support a finding that it attempted in good faith to comply with Commission rules with respect to the renewal of the licenses for Stations WPOI503, WPOI504, and WPOI505. For example, it has not described any steps that might have been taken during the 90-day renewal period to submit the required applications in a timely manner or a declaration signed by the person responsible for making the filings stating that, under the penalty of perjury, he or she unintentionally did not file renewal applications along with the coverage notifications for the licenses.

18. DeltaCom further argues that granting its waiver requests would be in the public interest because the stations "provide service to hundreds of users, including a number of public service entities, such as, towing companies, taxi services, waste removal companies and armored vehicle companies."<sup>41</sup> DeltaCom, however, makes no showing on how providing service to these customers in the instant case constitutes unique or unusual factual circumstances. Nor do DeltaCom's waiver requests identify any harm to public safety or consumer welfare that would result from license termination.<sup>42</sup> While DeltaCom argues that its customer base supports grant of its waiver requests, it does not show that termination of service to its customers would leave them without reasonable service alternatives or result in loss of a unique service.<sup>43</sup> Furthermore, we have previously found that the nature of a licensee's operations, by itself, does not justify a waiver.<sup>44</sup>

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<sup>39</sup> See also Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Cheng-Yi Liu, Esq., Counsel to Wave Runner, LLC (ULS File Nos. 0004868550 and 0004868551) (Dec. 14, 2011) (granting requests for waiver of the deadline for filing renewal applications for two broadband PCS licenses where the person responsible prepared and filed in a timely manner seven of nine renewal applications held by affiliate companies managed by a single person for licenses expiring within the same timeframe and providing service within the same geographic area).

<sup>40</sup> Waiver Requests at 2.

<sup>41</sup> *Id.*

<sup>42</sup> See *Anderson Communications*, 16 FCC Rcd at 15022, ¶ 7 (denying a request for waiver of the deadline for filing renewal applications, in part, where the licensee did not identify any harm to public safety or consumer welfare that would result from license termination); *Peacock's Radio*, 16 FCC Rcd at 15018, ¶ 7 (same).

<sup>43</sup> See *Anderson Communications*, 16 FCC Rcd at 15022, ¶ 7 (stating that while the licensee provided a list of some of its customers, it provided no showing that termination of service to those customers would leave them without service alternatives or result in loss of unique service); *Peacock's Radio*, 16 FCC Rcd at 15018, ¶ 7 (same); Gene A. Smith, *Order*, 17 FCC Rcd 13366, 13367, ¶ 4 (CWD WTB 2002) (denying a request for waiver of the deadline for filing renewal applications, in part, because the licensee did not show that termination of service to its customers would leave them without service alternatives or result in loss of unique service); *Western Communications, Inc., Order*, 16 FCC Rcd 15240, 15241, ¶ 5 (CWD WTB 2001) (noting that while the licensee "mentions its customers," it provided no showing that termination of service to its customers would leave them without service alternatives or result in loss of unique service).

<sup>44</sup> See *Bangor Hydro Decision*, 25 FCC Rcd at 13314 (finding that the nature of the licensee's operations, the monitoring and controlling the flow of electricity, by itself, does not justify a waiver of the deadline for filing renewal applications); *AlarmNet Decision*, 24 FCC Rcd at 11768 (concluding that the role of the facilities in maintaining safe and efficient operation of the licensee's monitoring systems, by itself, is insufficient to justify a waiver of the deadline for filing renewal applications); *ConocoPhillips Decision*, 24 FCC Rcd at 11757 (concluding that even though the stations at issue might play an important role in maintaining the licensee's safe and efficient operations, that, by itself, is insufficient to justify a waiver); *Fresno City and County*, 15 FCC Rcd at 11001, ¶ 8

(continued....)



19. Moreover, DeltaCom's renewal applications do not include information, separate from population coverage information provided in a coverage notification, supporting a finding that Stations WPOI503, WPOI504, and WPOI505 have provided substantial service and that the licensee had substantially complied with relevant Commission and statutory requirements over the terms of the past licenses. While the waiver requests assert that the stations provide service to hundreds of users, DeltaCom does not offer any detail regarding those subscribers.<sup>45</sup> Nor does DeltaCom provide information to support a finding that it has substantially complied with Commission rules, policies, and statutory requirements over the terms of the stations' licenses.<sup>46</sup> We also note that DeltaCom did not seek reconsideration of the dismissal of its coverage requirement notifications. As a result, the dismissal of those notifications has become final.

20. DeltaCom filed its renewal applications over two and one-half months late, requiring a stricter level of review of its waiver requests than if it had filed the applications within 30 days of license expiration. Consistent with precedent and based on our review of the record, we find that DeltaCom neither provides reasons for its late filings sufficient to grant a waiver nor offers information demonstrating the potential consequences to the public upon termination of the licenses. DeltaCom's record of failure to comply previously with Commission requirements shows two of the three licenses have already required reinstatement. Finally, DeltaCom has failed to meet the Commission's substantial service and other compliance requirements for renewal of 220 MHz licenses. Taking into account all of the facts and circumstances, we conclude that DeltaCom's failure to renew its licenses in a timely manner because of administrative oversight does not justify waiver of the Commission's rules. We therefore deny the requests for waiver and dismiss the associated renewal applications.

21. We will, however, grant DeltaCom its STA requests to operate on the spectrum associated with Stations WPOI503, WPOI504, and WPOI505 for a limited period of time. We find that it is in the public interest to provide DeltaCom with the opportunity to make arrangements to discontinue its station operations in an orderly manner. We therefore grant DeltaCom's pending STA requests for 90 days from the date of this Order. If DeltaCom needs additional time to complete an orderly discontinuance of operations, it may file a request to renew its STA pursuant to Section 1.931 of the Commission's rules, for up to an additional 90 days, together with the appropriate filing fee. If DeltaCom does not request additional special temporary authority, it will no longer be authorized to provide further service and shall cease any and all operations by the end of the 90-day period. DeltaCom shall notify the Mobility Division that it has stopped operations and shall provide the date upon which its operations ceased, which in no event can be later than July 11, 2012, unless DeltaCom obtains additional special temporary authority.

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(...continued from previous page)

(noting that the Commission has rejected arguments where the licensee "seeks to be excused from its failure to renew its original license, based on the benefit its use of that spectrum will confer on the public") (citing *Waste Management, Collection & Recycling, Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd 12939, 12944, ¶ 12 (1999)).

<sup>45</sup> Compare *Tuchman & Brown* at 9-10 (concluding that the licensee's renewal application included information supporting a finding that Station WPQP245 had provided substantial service over the term of its past license). In its renewal application, the licensee stated that the station "is currently loaded with almost 300 mobile units by 17 separate subscribers operating on the system, including ambulance and school bus services, and a local government agency that provides meals and other services for people who are confined to their homes." *Id.* The renewal application also included a detailed list of 17 subscribers to support the licensee's statement that it served 297 mobile units. *Id.*

<sup>46</sup> Compare *id.* at 10 (finding that the licensee's detailed statements that it had constructed and consistently filed all required applications and notifications in compliance with Commission rules sufficient to meet the Commission's renewal requirements).

#### IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131, 0.331, and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, that the waiver requests filed by DeltaCom, Inc. for Stations WPOI503, WPOI504, and WPOI505 on June 4, 2009, ARE DENIED.

23. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131, 0.331, 1.934, 1.949, and 1.955 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.934, 1.949, 1.955, the renewal applications, File Nos. 0003859347, 0003859348, 0003859349, filed by DeltaCom, Inc. for Stations WPOI503, WPOI504, and WPOI505 on June 4, 2009, ARE DISMISSED as defective.

24. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 309(f) of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 303(r), 309(f), and Sections 0.131, 0.331, and 1.931 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.931, the Mobility Division shall grant the applications, File Nos. 0003886738, 0003886785, and 0003886791, filed by DeltaCom, Inc. on June 19, 2009, for special temporary authority to operate Stations WPOI503, WPOI504, and WPOI505 for a period of not more than 90 days from the release date of this Order, to July 11, 2012.

FEDERAL COMMUNICATIONS COMMISSION

Cyndi Thomas  
Assistant Chief, Mobility Division  
Wireless Telecommunications Bureau